

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Disposition of Down Payments and)	
Pending Applications Won During)	
Auction No. 35 for Spectrum)	WT No. 02-276
Formerly Licensed to NextWave)	
Personal Communications, Inc.,)	
NextWave Power Partners, Inc. and)	
Urban Comm – North Carolina, Inc.)	

COMMENTS OF THE PROGRESS & FREEDOM FOUNDATION

The Progress & Freedom Foundation (“Foundation”) is pleased to respond to the Commission’s request for comments on the disposition of down payments and pending applications won during Auction 35.¹

The Foundation is a research and educational organization dedicated to studying the digital revolution and its implications for public policy. As such, it has conducted numerous studies of telecommunications markets and their relationship to public policy issues, as well as the relationship between the telecommunications sector and aggregate economic performance.² Wireless issues, including specifically the

¹ These comments are filed by the Foundation on behalf of the author, Jeffrey Eisenach. The views expressed herein are those of the author and do not necessarily reflect those of the Foundation, its Board or other staff.

² See Thomas M. Lenard, “The Economics of the Telecom Meltdown,” *Progress on Point* 9.6 (February 2002)(Washington, D.C.: The Progress & Freedom Foundation); Larry F. Darby, Jeffrey A. Eisenach and Joseph S. Kraemer, “The CLEC Experiment: Anatomy of a Meltdown,” *Progress on Point* 9.23 (September 2002)(Washington, D.C.: The Progress & Freedom Foundation); Jeffrey A. Eisenach,

appropriate means for allocating wireless spectrum to its highest valued uses, have figured prominently in the Foundation's program of research.³ In 2001, the Foundation submitted comments to the Commission raising questions regarding the allocation and use of spectrum for Mobile Satellite Service ("MSS").⁴ The author of these comments, Jeffrey A. Eisenach, has participated actively in all of these studies, and authored many of them.

The facts before the Commission in this matter are clear and essentially undisputed. Simply put, the Commission auctioned the same slice of spectrum twice – first to Next Wave and then, subsequent to NextWave's default, to several commercial mobile radio service (CMRS) providers, including most prominently AT&T Wireless, Cingular and Verizon. Subsequent to the second auction, the Commission's decision to revoke Next Wave's licenses was overturned in court. The Commission has appealed the decision, and its appeal is pending before the Supreme Court. In the meantime, the Commission has refunded the bulk of the initial payments made to the government by the winners in the second auction, but has (a) retained nearly \$500 million in down payments and (b) refused to release the winners from their obligations ultimately to pay

Thomas M. Lenard and Stephen McGonegal, *The Digital Economy Fact Book, Third Edition* (Washington, DC: The Progress & Freedom Foundation, 2001).

³ George A. Keyworth, II, Jeffrey A. Eisenach, Thomas Lenard and David E. Colton, "Part III: Voluntary Reallocation of Radio," *The Telecom Revolution: An American Opportunity* (Washington, D.C.: The Progress & Freedom Foundation, 1995) 70-79; Lawrence J. White, "'Propertyizing' The Electromagnetic Spectrum: Why Its Important, and How to Begin," *Communications Deregulation and FCC Reform*, edited by Jeffrey A. Eisenach and Randolph J. May, (Washington, D.C.: Kluwer Academic Publishers, 2001), 111-144; Randolph May, Rudy Baca, Steven K. Berry, Kevin Krufky, Edmond J. Thomas and Michael D. Gallagher, "When Wireless Grows Up: Mandates vs. Markets for a 'Mature' Industry" (July 12, 2002); and Randolph May, Steven Berry, Michael Chappell, Joseph Gattuso, Thomas Sugrue, "ABC's of Getting to 3G Wireless – Another Broadband Alternative Waiting to be Born: A Symposium," *Progress on Point* 8.15 (July 2001)(Washington, D.C.: The Progress & Freedom Foundation).

⁴ Comments of The Progress & Freedom Foundation, *In the Matter of Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services including Third Generation Wireless Systems*, ET Docket No. 00-258, October 22, 2001.

for the spectrum, should the Commission be successful in retrieving it from Next Wave through the courts. The total amount of these obligations is in excess of \$16 billion.

The issue now before the Commission is whether to allow the winning bidders to opt-out of their spectrum rights, receive refunds on the down payments still retained by the Government, and be relieved from any further obligations to pay. It should do so.

The extraordinary economic distress of the telecommunications sector is well-documented and, as the notice in this proceeding suggests, recognized by the Commission. Four aspects of the telecom meltdown should weigh most heavily in the Commission's deliberations. First, more than 500,000 telecommunications workers have lost their jobs since January 2001, far and away the most of any sector of the economy. Second, the telecommunications sector plays a central, catalytic role in the information-technology driven innovation that drives overall economic growth in an information economy. Third, the dramatic decline in business investment in information technology is among the most significant causes of the current economic downturn. Finally, the downturn in the capital markets overall, combined with reduced investor confidence in the telecommunications sector in particular, have made it exceptionally difficult for telecommunications firms to raise capital.⁵

In its deliberations in this proceeding, the Commission should focus especially on the third and fourth items – the importance of IT investment spending in the current downturn, and the scarcity of financing available to telecommunications companies to engage in such investment.

⁵ See Thomas M. Lenard, "The Economics of the Telecom Meltdown," *Progress on Point* 9.6 (February 2002)(Washington, D.C.: The Progress & Freedom Foundation).

With these factors in mind, the Commission should consider further that the \$16 billion in obligations from which it now proposes to release the Auction 35 “winners” is represented on those firms’ balance sheets as a contingent liability. While investors no doubt discount this liability by some percentage, the firms themselves – cognizant of the fiascos at Enron, Global Crossing and WorldCom – do not have this luxury. In the current environment, they must behave as though these obligations will come due, and set aside reserves accordingly.

Simply put, the \$16 billion in obligations associated with Auction 35 is economically indistinguishable, in so far as its effect on the firms’ behavior, from an additional \$16 billion in debt. And the Commission is well aware that high levels of debt have already led to dramatic declines in IT investment. In comments previously submitted to the Commission, one respected economist has estimated that the aggregate effect of releasing the firms from their obligations would be to increase economic activity by between \$19 billion and \$52 billion.⁶ Our review of these comments suggests that the analysis is sound, and that the impact of releasing these firms from their Auction 35 obligations would be to give a substantial boost to the telecommunications and IT sectors in particular, and the economy as a whole.

For the wireless sector in particular, \$16 billion would represent a substantial proportion of the investment needed to (a) continue upgrading and expanding existing wireless networks, (b) begin building out a 3G infrastructure and/or (c) continue exploring new technologies, such as software defined radio, that promise to dramatically increase the value of wireless services in the future. Such funds are especially

⁶ J. Gregory Sidak, “The Economic Benefits of Permitting Winning Bidders to Opt Out of Auction 35,” Manuscript. (August 21, 2002) (Washington, D.C.: Criterion Economics).

important for an industry struggling under the increasing weight of government mandates.

Finally, the Commission notes in its comments that it has an obligation to maintain the integrity of the auction process. In this regard, the Commission should keep in mind that the main purpose for using auctions to allocate spectrum is to provide the appropriate economic incentives for its efficient use – that is, to mimic, to the extent possible, the results of an efficiently operating marketplace. Such a marketplace must be governed by basic rules, including the willingness of each party to live up to its obligations. When one party, in this case the Commission, fails to do so, the effect is to harm the market's ability to function by undermining the trust that is an essential component of the free enterprise system. The Commission can best preserve the integrity of the auction process, therefore, by bringing the Auction 35 debacle to a swift and honorable conclusion.

Respectfully submitted,

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